IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DEQUAUN MCLEAN,
Petitioner.

No. 2 CA-CR 2018-0179-PR
Filed January 18, 2019

Petition for Review from the Superior Court in Cochise County
No. S0200CR200500904
The Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barton & Storts P.C., Tucson
By Brick P. Storts III
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R OM, Chief Judge:

¶1 Petitioner DeQuaun McLean seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). McLean has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, McLean was convicted of two counts of transporting a narcotic drug for sale, and the trial court sentenced him to enhanced, concurrent prison terms of 15.75 years. This court affirmed his convictions and sentences on appeal. *State v. McLean*, 2 CA-CR 2006-0424 (Ariz. App. May 1, 2008) (mem. decision). McLean sought post-conviction relief, which was denied in 2009 after appointed counsel filed a notice pursuant to *Montgomery v. Sheldon*, 182 Ariz. 118 (1995), and he failed to file a pro se supplemental brief. Later in 2009, McLean filed a "Motion of Sentence Reduction," which the court deemed a petition for post-conviction relief in a successive proceeding, and denied.

¶3 In 2016, McLean filed another notice of post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and was "unable to find a meritorious issue of law or fact" to raise in Rule 32 proceedings. After McLean requested an extension of time to file his pro se supplemental brief pursuant to *Montgomery*, a second attorney filed a notice of appearance. That attorney filed a petition for post-conviction relief, arguing there was newly discovered evidence of misconduct unrelated to McLean's case by one of the investigating officers, Officer Mitchell, and such evidence could have been used to impeach the officer's testimony that the car in which McLean had been traveling was speeding at the time of the traffic stop that led to the discovery of drugs. He contended the evidence was impeaching and should have been disclosed as required by *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¶4 The trial court determined McLean was entitled to an evidentiary hearing on his claim of newly discovered evidence, but denied relief after the hearing. The court concluded McLean had established that the evidence was discovered after trial and that he had been diligent in securing it, but that he had not shown the impeachment evidence probably would have changed the verdict.

¶5 On review, McLean argues the trial court erred in denying relief because Officer Mitchell's "testimony was intrinsic and material" and the newly discovered evidence of his misconduct "would have created a reasonable doubt in the minds of the jurors."[1] Our review of the court's factual findings "is limited to a determination of whether those findings are clearly erroneous"; we "view the facts in the light most favorable to sustaining the lower court's ruling, and we must resolve all reasonable inferences against the defendant." *State v. Sasak*, 178 Ariz. 182, 186 (App. 1993). When "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.*

¶6 A claim under *Brady* is a constitutional claim cognizable under Rule 32.1(a). *See Brady*, 373 U.S. at 87 (suppression of evidence by state "of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). As such, it is precluded under Ariz. R. Crim. P. 32.2(a). However, as the trial court properly recognized, McLean is entitled to seek relief based on newly discovered evidence. Ariz. R. Crim. P. 32.2(b), 32.4(a).

¶7 Rule 32.1(e) provides that "newly discovered material facts exist if" the facts existed at the time of trial, but "were discovered after the trial," "the defendant exercised due diligence in discovering these facts," and the "newly discovered facts are material and not . . . used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of critical significance such that the evidence probably would have changed the verdict." *See also State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016). We cannot say the impeachment evidence presented meets the standard set forth in the rule.

---

[1]McLean also argues he was entitled to relief because the officers improperly delayed his detention. Although the trial court addressed this point in its ruling, it is precluded as it could have been raised in previous proceedings. *See* Ariz. R. Crim. P. 32.2(a).

¶8 As the trial court pointed out, although Officer Mitchell could have been impeached with evidence of his unrelated conduct in regard to his testimony about whether the vehicle in which McLean was found had been speeding, other officers witnessed the stop and one testified, as had Officer Mitchell at the suppression hearing, that the license plate had also been improperly affixed and lit, providing another valid basis for the stop in addition to speeding. Accordingly, we cannot conclude the trial court abused its discretion in deciding that the evidence was not "of critical significance at trial such that the evidence probably would have changed the verdict or sentence." *See* Ariz. R. Crim. P. 32.1(e).

¶9 Although we grant the petition for review, we deny relief.